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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960.

No. 91.

UNITED STATES OF AMERICA,
Appellant,

v.

ROY FRUEHAUF, *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR APPELLEES ROY FRUEHAUF, FRUEHAUF TRAILER CO., BURGE SEYMOUR, ASSOCIATED TRANSPORT, INC. AND BROWN EQUIPMENT AND MANUFACTURING CO.

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Statement.

The appellant's descriptions of the "Opinion Below," "Jurisdiction," "Question Presented" and "Statutes Involved" (Br., pp. 1-3) are substantially adequate.

The appellant's references, in its statement and elsewhere (Br., p. 16), to the circumstances and details of the loan, however, are irrelevant and improper. In the first place, the Notice of Appeal and the Jurisdictional Statement herein limit the question on the appeal to whether a concededly genuine, or *bona fide*, loan is "within the proscriptions of Section 302 (a) and (b) of the Labor-Man-

agement Relations Act" (R. 48; Jurisdictional Statement, p. 2). Secondly, any other question or any other facts are outside the scope of this appeal, since this Court, in reviewing a decision which "the District Court has rested • • • upon the construction of the underlying statute • • • is not at liberty to go beyond the question of the correctness of that construction." *United States* v. *Hvass*, 355 U. S. 570, 574; see also: Revised Rules of the United States Supreme Court, Rule 40.[1]

Summary of Argument.

In the interest of clarity, we have separated our argument into two points (although they both lead to the same conclusion): (1) the statute as it existed at the time of the transaction in question (1954) did not prohibit a loan, and (2) the subsequent amendment thereto in 1959, adding the word "lend," clearly confirmed Congress' understanding that a loan had not previously been prohibited.

I.

A. The verbs "pay or deliver," as used in Section 302 (a), do not fairly connote or include a loan. They would

[1] The Government's extraneous references are not only irrelevant but are particularly inappropriate, since the instant loan was repaid in full with interest long before any investigation was begun and years before the indictment was filed (R. 13, 6). Indeed, the McClellan Committee investigation disclosed that the loan was not motivated by the desire for any labor benefit or advantage, but was made solely as an act of personal gratitude for a previous, larger loan to appellee Fruehauf by the union of which Beck was president—a loan made openly and publicly (as the union had made to others with its surplus funds), for entirely legitimate business reasons, and repaid in full with interest. (Hearings before the Senate Select Committee on Improper Activities in the Labor-Management Field, 85th Cong., 1st Sess., Part 7 at 2197-2211). The motivation here was actually akin to the type of personal relationship which Judge Hand, in *United States* v. *Ryan*, 225 F. 2d 417, 427, expressly distinguished from "the prospect of possible benefits to come."

not be so understood in ordinary, every-day usage and, *a fortiori,* should not be so construed when used in a criminal statute. Where Congress, in framing similar, contemporaneous statutes, desired to proscribe loans as well as gifts and payments, it uniformly included the words "loan" or "lend," and had it intended loans to be covered by Section 302 (a), it would certainly have expressly so provided.

B. Section 302 (a) creates an entirely new crime, which is merely *malum prohibitum.* At best, its application to loans is ambiguous and equivocal, so that, under the most fundamental canons of criminal statutory construction, the more restricted alternative must be adopted. A contrary construction would deprive defendants of the fair and unequivocal warning to which they were entitled.

C. Analysis of the statute and all the decisions clearly negatives any such all-encompassing (and unexpressed) purpose or policy as appellant postulates. Certainly Congress did not prohibit every act by an employer which "tends to engender . . . gratitude in the representative" (see Br., p. 16). The failure to include loans in the five "exemptions" in Section 302 (c) is meaningless, since all of those exemptions pertain to simple "payments" which, if they had not been exempted, would have been clearly included in Section 302 (a). Appellant's authorities either gave the statute a restrictive construction, against the Government, or held that such a construction would "reduce the statute to a practical nullity"—which is clearly not the case here.

D. The history of the statute discloses that its purpose was not broad but narrow, and the statements of its proponents suggest restrictive criteria, rather than the all-encompassing ones postulated by the appellant. The statements quoted by appellant are torn out of context

and they were all directed toward what was generally acknowledged to be the primary (although not the sole) purpose of the statute, namely, the regulation of union welfare funds. What is significant is that in all of the volumes of detailed Congressional debate and Committee hearings on this statute, and despite the many, specific consequences which its opponents admonished Congress would flow from the bill, no one even mentioned its possible interdiction of loans.

II.

The 1959 amendment to Section 302 of the Labor-Management Relations Act of 1947 added the word "lend" to the prohibitions of Section 302 (a), thereby making it a crime for an employer to "pay, *lend* or deliver" money or other thing of value to a representative of his employees.

The amendment demonstrates Congress' own understanding that the statutory prohibition had not theretofore encompassed a loan. The legislative history of the amendment shows that the respective House and Senate Committees, the sponsors of bills containing the amendment, labor-relations experts, and the leading labor spokesman all shared the view that the amendment added a prohibition against loans by employers to labor representatives which was not included in the original act.

Where a statute, particularly a criminal statute, is amended so as to include an additional specification of the crime, the amendment is in effect a legislative declaration that the act thus specified was not theretofore unlawful. *Viereck* v. *United States,* 318 U. S. 236; *United States* v. *Chase,* 135 U. S. 255.

ARGUMENT.

POINT I.

Section 302(a) of the Labor-Management Relations Act (1947) did not proscribe a loan by an employer to a labor representative.

A. The words "pay or deliver" do not fairly connote a loan.

The words "pay or deliver any money or other thing of value," as used in Section 302 (a) of the Labor-Management Relations Act of 1947, do not reasonably include the making of a loan. Webster's New International Dictionary (in substantially the same language as Funk & Wagnall and all of the other dictionaries) defines "pay" as:

> "2. To satisfy (one) for service rendered; property delivered, etc.; to discharge one's obligation to; to make due return to; to compensate; remunerate; • • • 3. To give in return for services, purchases, etc., in satisfaction of a promise, a moral debt, • • • or in retribution (that which is due) • • • 4. To make compensation or retaliation for • • •; to make up for • • •; to recompense • • • 5. To give, offer or make, freely or as fitting • • •."

It defines "deliver" as (*inter alia*) "To give or transfer; to yield possession or control of; to part with; to make or hand over." The synonym given for "deliver" is "release," and none of the many synonyms given for "pay" in any dictionary includes "lend." The mere assertion that a loan of money can be a "thing of value" is irrelevant; the point is that the verbs "pay" and "deliver" do not include "lend."

It is universally recognized that "the word 'pay' indicates the discharge of an obligation rather than an investment of money." *Hopson* v. *The Aetna Axle & Spring Co.*, 50 Conn. 597, 601. A loan, like an investment, is "made," not "paid."

From the enactment of the Labor-Management Relations Act of 1947 until the date of the indictment, and indeed until the present time, the only other decision relating to the coverage of a loan of money by Section 302 is *United Garment Workers* v. *Jacob Reed's Sons*, 83 F. Supp. 49 (E. D. Pa.). It was there held that, "The term 'payment' used in this section [Sec. 302(c)] does not mean a loan" (83 F. Supp. at 52).

Nor would anyone ordinarily describe the making of a loan as a "delivery." See, *Western Union* v. *Lenroot*, 323 U. S. 490, 505-06, where this Court held that, even in a non-criminal statute, the construction of such common verbs must be limited to their ordinary, "marketplace" usage, even though "linguists and scholars" might ascribe a broader meaning to them.

In support of its contention that "delivery" encompasses the making of a loan, the appellant (Br., p. 13) urges that, "Every loan contemplates a transfer, delivery, or acceptance of something having specific identity." That contention—even apart from the strained use of the word "deliver"—is inaccurate, since a great many loans consist merely of the creation of a bank credit, not involving any "delivery" to the borrower at all—or, *a fortiori*, the delivery of "something having specific identity." Certainly, Congress, in using the word "delivery," did not have in mind such creations of credit, or, as appellant argues, "every loan."

In any event, it should not be assumed that Congress used these simple words "pay" and "deliver" loosely or

ambiguously. As this Court held in *Bell* v. *United States*, 349 U. S. 81, 83:

> "About only one aspect of the problem can one be dogmatic. When Congress has the will it has no difficulty in expressing it—when it has the will, that is, of defining what is desired to make the unit of prosecution and, more particularly, to make each stick in a faggot a single criminal unit."

Had Congress intended to proscribe loans, it could easily, and should, have expressly done so—as it did twelve years later. Thus, when it defined the terms "contribution" and "expenditure," within the restrictive sections of the criminal statute pertaining to "Elections and Political Activities" (18 U. S. C. 591-612), Congress was not content with the words "gift" and "payment," but expressly included the word "loan" in both definitions (18 U. S. C. 591). Significantly, both definitions also contained the phrase—virtually identical with that in the instant statute—"money, or anything of value," but that did not obviate the necessity of specifying a "loan".

Similarly, when Congress, in the Federal Corrupt Practices Act [2 U. S. C. 241(d) and (e)], prohibited certain election contributions by national banks and other federal corporations, it expressly defined the term "contribution" to include a "loan," as well as a "gift." Here again, Congress used the same phrase "money, or anything of value," but again did not rest thereon.

Again, in proscribing financial benefits by bank officers to examiners, Congress expressly included a "loan" (18 U. S. C. 217). Both this statute and 18 U. S. C. 591, above cited, were enacted in 1948, only one year after the Labor-Management Relations Act. This renders all the more significant Congress' omission from Section 302 of any reference to loans whatsoever, until twelve years later, in 1959.

B. The District Court properly rejected a construction of the statute which would have deprived the accused of an unequivocal warning.

Any doubt as to the meaning of Section 302 (a) is resolved by the canons of construction applicable to criminal statutes. It is elementary that, "In the construction of a penal statute, all reasonable doubts concerning its meaning ought to operate in favor of the accused. *Harrison* v. *Vose*, 9 How. 372, 378." *North American Van Lines* v. *United States*, 243 F. 2d 693, 696 (C. A. 6), citing, *inter alia*, *United States* v. *Resnick*, 299 U. S. 207 and *Federal Communications Commission* v. *American Broadcasting Co.*, 347 U. S. 284.

McBoyle v. *United States*, 283 U. S. 25, 27 (Holmes, J.) held that an airplane was not a "motor vehicle • • • or any other self-propelled vehicle not designed for running on rails," within the meaning of a statute penalizing the transportation of stolen vehicles. In unanimously reversing a judgment of conviction, this Court indicated that even in the case of a criminal who, "it is not likely • • • will carefully consider the text of the law before he murders or steals, it is reasonable that a fair warning should be given • • • in language that the common world will understand," and that "the statute should not be extended to aircraft simply because it may seem to us that a similar policy applies. . . " How much more strongly do these principles apply to the instant attempt to extend the statute, on grounds of "similar policy," to these defendants, who certainly would not have made the loan if they had been fairly notified, or had even suspected, that such conduct was criminal.

Prior to the enactment of Section 302 (a), it was not a crime for an employer to pay or deliver any money or other thing of value to a representative of his employees,

and the crime which it created was solely *malum prohibitum*. *United States* v. *Ryan*, 350 U. S. 299, 305; *Brennan* v. *United States*, 240 F. 2d 253 (C. A. 8), *cert. den.*, 353 U. S. 931. Consequently, that statute must be construed in accordance with the requirement that it give the employer a clear and unequivocal warning, in language which the ordinary layman will understand, of precisely what acts are rendered criminal and will result in the deprivation of his liberty or property and his reputation.

As this Court succinctly held in *Connally* v. *General Construction Co.*, 269 U. S. 385:

> "That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law. • • • 269 U. S. at 391.
>
> " 'The dividing line between what is lawful and unlawful cannot be left to conjecture. The citizen cannot be held to answer charges based upon penal statutes whose mandates are so uncertain that they will reasonably admit of different constructions. • • • Penal statutes prohibiting the doing of certain things, and providing a punishment for their violation, should not admit of such a double meaning' • • •." 269 U. S. at 393.

Even if Section 302 (a) does not, as we contend, clearly exclude loans, unquestionably it does, at best, "admit of a double meaning," in which "the dividing line between what is lawful and unlawful" is not clear. Consequently:

> "[I]t is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite. We should not derive criminal outlawry from some

ambiguous implication." *United States* v. *Universal C. I. T. Credit Corp.*, 344 U. S. 218, 222.

Among the numerous other authorities to the same effect are: *Bell* v. *United States*, 349 U. S. 81 (*supra*); *United States* v. *Cardiff*, 344 U. S. 174; *United States* v. *McNinch*, 356 U. S. 595; *Iselin* v. *United States*, 270 U. S. 245; Hall, *Strict or Liberal Construction of Penal Statutes*, 48 Harv. L. Rev. 748, 765-66, and cases cited therein.[2]

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[2] Appellant (Br., pp. 36-38) misconstrues this entire argument as one addressed to the constitutionality of Section 302 (a), and all of its authorities involve primarily questions of constitutionality, rather than statutory construction (ftn. 11). It is, however, unnecessary for this Court, in order to affirm the fairer and clearer interpretation of the statute given by the District Court, to hold that a contrary interpretation would be unconstitutional.

In addition, every one of the appellant's authorities is distinguishable on the ground that the statutory language involved was, wholly unlike Section 302 (a), either clear or not susceptible of further clarification. As was held in appellant's leading authority of *United States* v. *Petrillo:* "But none [no more precise language] occurs to us, nor has any better language been suggested, effectively to carry out what appears to have been the Congressional purpose" (p. 7). In the instant statute Congress, had it so intended, needed merely to add the word "lend".

Further, in *Dennis* v. *United States*, *Screws* v. *United States* and *Williams* v. *United States*, *Gorin* v. *United States* and *Boyce Motor Lines* v. *United States*, the crime defined by the statute expressly required a specific or general criminal intent (*e. g.*, as this Court held in *Screws*, "specific intent," pp. 103-04; in *Boyce Motor Lines*, "culpable intent," p. 342; and in *Dennis*, an offense against "moral standards"—183 F. 2d 201, 215, affirmed 341 U. S. 494). All of those decisions held that under such circumstances the doctrine of fair warning is not controlling, since, "a mind intent upon wilful evasion is inconsistent with surprised innocence". *United States* v. *Ragen*, 314 U. S. 513. In the instant case there is no requirement of intent whatsoever, so that an interpretation which gives a clear warning is imperative.

In addition, *Chaplinsky* v. *New Hampshire*, *Omaechevarria* v. *Idaho*, and *Kovacs* v. *Cooper* involved not federal but state statutes, in which the construction determined by the highest state court is binding on this Court, and the only permissible review is of constitutionality. *Old Dearborn Co.* v. *Seagram Corp.* involved a civil and not a criminal statute, so that it is completely inapplicable. *Williams* v. *United States*, *Screws* v. *United States* and *United States*

The legislative history of the 1959 amendment (Point II, *infra*) shows that Congress itself thought that loans were not proscribed by Section 302 as originally enacted. If Congress so believed—or *even if it was not clear*—surely a layman, like these appellees, could not have clearly understood, and therefore was not given fair and unequivocal warning, that the statute prohibited loans.

C. The appellant's attempt to enlarge the statutory prohibition by its evaluation of the underlying policy is untenable and contrary to its own authorities.

The appellant's argument (Br., p. 16) that the "purpose" of the original Section 302 requires that it be construed to include a loan, since a loan "tends to engender the very same emotion—gratitude—in the representative," is untenable and irrelevant.

Congress evidently believed that a loan to a labor representative, which he intended to and did repay, did not have the same potential consequences as a gift. Certainly, the exclusion of loans from the statutory prohibition would not "reduce the legislation to a practical nullity," within the rationale of the appellant's authority of *United States* v. *Ryan*, 350 U. S. 299, 306.

Appellant's reliance (Br., pp. 17-18) upon the fact that Congress did not include loans in any of the five "exemptions" provided in Section 302 (c) is clearly erroneous; at best, it begs the entire question. All of the transactions described in these exemptions would have been pro-

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v. *Harriss* are essentially adverse to the appellant, since this Court there expressly adopted a "close construction," on the ground that "it would save an act from vagueness that is fatal." (341 U. S. at 101)

hibited by the express language of Section 302 (a) if they had not been excepted; all of them were, incontrovertibly, payments of money. On the other hand, it was unnecessary for Congress to exempt loans, for the very reason that they did not constitute payments or delivery of money or other thing of value.

Arroyo v. *United States*, 359 U. S. 419, also relied on by appellant (Br., pp. 6, 13, 14), actually gave Section 302 (a) a restrictive, rather than a broad, interpretation. The Court pointed out:

> "We construe a criminal statute. 'It is the legislature, not the Court, which is to define a crime, and ordain its punishment'." 359 U. S. at 424.

The language of Mr. Justice Holmes there quoted (Br., p. 13) confirms that criminal laws will be sensibly construed "as saying what they obviously mean." It cannot be seriously contended that Section 302 "obviously means" loans.

This Court's language in *United States* v. *Ryan*, 350 U. S. 299, *supra*, is quoted out of context (Br., pp. 14, 15). It was there merely decided that "the president and principal negotiator of a labor union [who had received several outright and egregious gifts from the employer] [was] a 'representative' of employees within the meaning of §302 (b)" (p. 300). The Court expressly based its interpretation upon three factors: (1) that it was required by the "literal meaning" of the words (p. 302); (2) that it was supported by the "legislative history" of the statute (p. 305); and (3) that any other interpretation, limiting the proscribed payments to those made to the union itself, would "reduce the legislation to a practical nullity" (p. 306, *supra*). *None* of these factors applies here.

Moreover, the argument of presumed Congressional policy must yield to the far clearer judicial policy of fair warning to the accused (*supra*, subdivision B). In most of the cases hereinabove cited in our subdivision B, the statutory language was no less "broad" than Section 302, and the Government also contended that the underlying policy of Congress was in jeopardy. Nevertheless, as this Court held in *United States* v. *Cardiff*, 344 U. S. 174:

> "The Department of Justice urges * * * that that construction is needed if the Act is to have real sanctions and if the benign purposes of the Act are to be realized.
>
> * * *
>
> "The vice of vagueness in criminal statutes is the treachery they conceal either in determining what persons are included or what acts are prohibited. Words which are vague and fluid (cf. *United States* v. *Cohen Grocery Co.*, 255 U. S. 81) may be as much of a trap for the innocent as the ancient laws of Caligula" (pp. 175-76).

Consequently, it would be immaterial even if Congress' omission of the word "loan" were attributable to "inadvertence." See, *Iselin* v. *United States*, 270 U. S. 245, 251, *supra*.

D. Appellant's resume of "the legislative history of Section 302" is misleading; that history actually discloses a narrow purpose, which should not be enlarged to include loans.

Appellant devotes almost ten pages of its brief (pp. 7-8; 18-26) to its argument that the legislative history of Section 302 shows an all-encompassing purpose "to prohibit all financial dealings," whereas, in fact, it discloses a specific, relatively narrow subject of concern. While quoting sporadically from statements of various Senators—

none of whom referred to loans in any way—appellant omits the cardinal fact which was emphasized by every one of them:

The Byrd amendment to the Case Bill which, as appellant acknowledges (Br., p. 18), was the forerunner of Section 302, was introduced solely to counteract a demand by the United Mine Workers "that mine operators create a welfare fund for the union by contributing 10 cents for each ton of coal mined." *United States* v. *Ryan*, 350 U. S. 299, 304-05, *supra*. All of the debates in both Congressional sessions referred to by appellant revolve about the central purpose of regulating union welfare funds, so that the resulting statute must be read in that context. Appellees do not dispute the appellant's statement, quoting *United States* v. *Ryan*, that "Congress was [not] aiming solely at the welfare fund problem" (Br., p. 25). However, it is abundantly clear that Congress was aiming primarily at that problem. This in itself provides restrictive criteria of construction and militates against the all-embracing interpretation invoked by the appellant (*e. g.*, Br., pp. 16-18).

As illustrative, Senator Byrd, the proponent of the amendment, stated:

> "It [the amendment] has a specific purpose, which is to prohibit the labor unions from requiring welfare funds to be paid into the treasuries of the labor unions" (93 Cong. Rec. 4678).

To precisely the same effect, see the remarks of Senator Byrd at the prior session, 92 Cong. Rec. 4891 (Br., p. 19).

Similarly, Senator Taft, after having reiterated that "[t]he occasion of the amendment was the demand by the United Mine Workers of America," stated:

> "The purpose of the amendment is to require that the fund shall be established in definite detailed form. • • • The purpose is to prevent the abuse of welfare funds" (93 Cong. Rec. 4746-47; to same effect, 1947 Senate Committee Hearings, 52-53).

Senator Ball, the other proponent quoted by the appellant (*e. g.*, Br., pp. 23-25), said:

> "Mr. President, the sole purpose of the amendment is not to prohibit welfare funds, but to make sure that they are legitimate trust funds • • •" (93 Cong. Rec. 4678).

Not a single sentence in the lengthy deliberations of either House or of their Committees intimates that Congress intended to proscribe loans. Indeed, the very excerpts which appellant has selected, when restored to their context, confirm the narrow primary purpose above indicated. Thus, appellant's first reference—to 92 Cong. Rec. 4893 (Br., p. 16)—which consists of a statement by Senator Byrd, is preceded by that Senator's declaratior that:

> "The amendment is for the purpose of prohibiting the payment of royalties to labor unions, which is the issue in dispute between the coal miners and the coal operators" (p. 4891).

Appellant's next reference (Br., p. 16), 93 Cong. Rec. 4678, is to a statement by Senator Ball, who clearly pointed out: "there is very grave danger that the [welfare] funds will be used for the personal gain of union leaders • • •" (*ibid.*). This observation was directed to the practice of using union welfare funds to buy health insurance policies, the commissions for which were paid to union leaders. Similarly, the language of Senator Byrd quoted by the

appellant (Br., p. 19) was immediately followed by that Senator's statement: "My amendment would prevent an employer from paying a royalty to the representative of a union * * *."

The "modifications" of the Byrd amendment referred to by the appellant (Br., p. 20)—most of which refer, again, to welfare funds—are entirely irrelevant here. Their only significance lies in their indication of the care and concern for detail manifested in this legislation—which precludes the inference that Congress, although silent with regard to loans, actually intended to prohibit them.

The quoted statements of Senators Taft, Tunnell and Pepper (Br., pp. 20-21) were all made in the context of welfare fund regulation. It is true that Senator Pepper, as the foremost opponent of the Byrd amendment, sought to admonish Congress that the consequences of the bill might transcend its purpose. However, the consequences depicted by him pertain, for the most part, to quasi-welfare activities—"baseball teams, dances and picnics" and "recreation funds" (Br., pp. 20, 22), and "improving housing conditions and providing playgrounds" (92 Cong. Rec. 5499, following shortly after the appellant's quotation at page 21)—not having the slightest resemblance to loans to union representatives.

Furthermore, as Senator Taft, the Committee Chairman, stated (to quote from appellant's own paraphrase at Br., p. 23), "the specific contributions referred to [by Senator Pepper] were already forbidden as an unfair labor practice." Since loans to a labor representative had never been previously forbidden, Senator Taft confirmed the fact that Senator Pepper was referring to payments of a wholly different character.

Appellant's brief omits from the second quoted reply of Chairman Taft (Br., p. 23), the balance of his statement, which is to the effect that:

> "the principal purpose • • • of the Byrd amendment [was] to see that if an agreement [for a welfare fund] was reached, it was properly limited and that the fund would not be turned over to some union leader with complete discretion • • •" (1947 Senate Committee Hearings, p. 53).

Again, in quoting from the testimony of William Green, appellant (Br., p. 24) omits Mr. Green's first sentence, which was as follows:

> "Section 201 of • • • S.55 apparently is an attempt to prevent bribery of union officials and to restrict *and regulate the establishment of so-called welfare funds.*" (Emphasis supplied).

Not only was Mr. Green's criticism of the bill completely silent regarding loans, but it is clear from the context that his concern about the prohibition against "bribery" related to the potential regulation of "checkoff" arrangements. Mr. Joseph Beirne, another labor leader whose testimony is fragmentarily quoted by appellant (p. 24), made it clear that he was referring to "a kickback or anything like that." Appellant (Br., p. 25), in referring to the portion of Senate Reports 105, 80th Congress, which became Section 302, omits any mention of its title, "3. Limitation on Abuse of Welfare Funds."

Finally, the remark attributed by appellant (Br., p. 25) to "opponents of the section" was not a statement but merely a question asked by Senator Ives. Moreover, even that question—which, like most of the arguments of the

opposing Senators, warned of remote potential consequences of the bill—was completely silent with regard to loans. That, indeed, is one of the most significant facts in these debates, since if any Congressman had thought that loans were within the prohibition of the statute, he would certainly have questioned or commented thereon.

Consequently, Section 302 (a) did not proscribe loans, either under its language, its purpose or its history. Moreover, any contrary interpretation of it would violate the requirement of fair and unequivocal warning.

POINT II.

The 1959 amendment of Section 302(a), by expressly adding the word "lend" to the acts proscribed, evidences Congress' own understanding that the statutory prohibition had not theretofore encompassed a loan. The history of this amendment clearly indicates that the word "lend" was intended to add another proscribed act.

While it is clear from the foregoing discussion that Section 302, as it stood at the time of the offense charged, did not cover loans, any doubt which might have existed has been laid to rest by the 1959 amendment of this section, which added, *inter alia*, the word "lend" to the prohibited acts.

The Act, as amended, reads in pertinent part as follows:

> "Section 302(a). It shall be unlawful for any employer or any person who acts as a labor relations expert, adviser or consultant to an employer to pay, *lend*, or deliver, or agree to pay, *lend*, or deliver,

any money or other thing of value * * *." (Emphasis supplied)

The Congressional proceedings which preceded and accompanied the amendment of Section 302 in 1959 establish that Congress recognized that the 1947 Act did not cover loans, and that the prohibition thereof was one of the express purposes of the amendment.

The 1959 amendments to the Taft-Hartley Act, in large measure, grew out of the findings of the Senate Select Committee on Improper Activities in the Labor-Management Field (the "McClellan Committee"). Thus, Section 2(b) of the preamble to the Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 537, 29 U. S. C. 401(b), states that:

> "The Congress further finds, from recent investigations in the labor and management fields, that there have been a number of instances of breach of trust, corruption, disregard of the rights of individual employees, and other failures to observe high standards of responsibility and ethical conduct which require further and supplementary legislation that will afford necessary protection of the rights and interests of employees and the public generally as they relate to the activities of labor organizations, employers, labor relations consultants, and their officers and representatives."

The Report of the Senate on the Act (No. 187, 86th Cong., 1st Sess.) states (p. 2):

> "The committee reported bill is primarily designed to correct the abuses which have crept into labor and management and which have been the subject of investigation by the Committee on Improper Activities in the Labor and Management Field for the past several years."

The Report of the Subcommittee on Labor of the House Committee on Education and Labor on the same legislation (No. 741, 86th Cong., 1st Sess.) sets forth the purpose of the Act in virtually identical language.

Among the disclosures made to the McClellan Committee in the course of its hearings were several instances in which employers had loaned money to representatives of their employees. Thus, the loan involved in the instant indictment was the subject of testimony in hearings before the McClellan Committee (Hearings before the Senate Select Committee on Improper Activities in the Labor-Management Field, 85th Cong., 1st Sess., Part 7, at 2201-29). Also, loans by officials of a baking and candy company in Zion, Illinois to James G. Cross, President of the Bakery and Confectionery Workers Union, the union which represented their employees were found to have been made. (*Id.*, Part 8, at 2857-60, 3010-12). And James Hoffa, of the Teamsters Union was found to have borrowed money from employers of teamsters either directly or through labor relations advisers to such employers (*Id.*, Part 13, at 5267). Consequently, Congress, through the investigation which led to the amendment, became fully apprised of the existence of loans by employers or their agents to representatives of their employees and the appellant's contention (Br., p. 28) that the only purpose of the amendment of Section 302 was to extend its prohibitions to so-called "middlemen", that is, hired labor-management relations advisers or consultants, is wholly without foundation.

That Congress in 1959 was vitally interested in prohibiting loans by employers directly to employee representatives is clear from the fact that every comprehensive labor reform bill that was introduced at the session of Congress at which the amendment to Section 302 was passed (86th Cong., 1st Sess.) added an express prohibition against such

loans, with the exception only of the administration bill (S. 748, H. R. 3540) which was not reported out of committee. S. 505, Section 112 (Kennedy-Ervin Bill); S. 1555, Section 211 (Kennedy-Ervin Bill with Senate Committee amendments); H. R. 8400, Section 502 (Landrum Bill); H. R. 8401, Section 505 (Griffin Bill); H. R. 8432, Section 505 (Elliott or House Committee Bill); H. R. 8490, Section 505 each added the word "lend" to the prohibited acts of Section 302. H. R. 4473, Section 213; H. R. 7265, Section 307(b); S. 1137, Section 408(b) (McClellan Bill) contained prohibitions against such loans in separate sections devoted solely to that purpose. Thus, each member of Congress who saw fit to originate a proposal in this area felt that the inclusion of the prohibition against loans by employers to labor representatives was an essential element of new legislation.

The person most intimately connected with the labor reform legislation enacted by the 86th Congress was Senator Kennedy. He had served as a member of the McClellan Committee and was the co-author of the entire Labor-Management Reporting and Disclosure Act of 1959, which survived the legislative process in large measure without material change except in the form of additions (S. 505, S. 1555). He was its proponent on the floor and the manager of the bill during its passage through the Senate. He was chairman of the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, which considered and reported on the proposed legislation, and was a member of the conference committee which harmonized the House and Senate versions.

Senator Kennedy stated at the time of the introduction of S. 505, the so-called Labor-Management Reform Bill of 1959, which contained the amendment to Section 302, that one of the effects of the proposed legislation was that:

> "Sixth. The Becks and Hoffas will find future collusion with employers vastly restricted—with *no more loans* from employer groups, no more attacks on rival unions through middlemen like Nathan Shefferman, and no more secrecy shrouding the use of union funds to bail out a collaborating employer." (105 Cong. Rec. 885; emphasis supplied)

In that statement Senator Kennedy was expressing the same view he had held during the McClellan Committee hearings when commenting on the very transaction here involved. After describing in detail the acts for which the appellees here have been indicted, he advised the Committee:

> "*While there is no law against it*, I think the committee should take cognizance of the attitude that they took before this committee and recognize that they have a responsibility as well as rights in this matter." (Hearings before the Senate Select Committee on Improper Activities in the Labor-Management Field, 85th Cong., 1st Sess., Part 7, at 2403-3; emphasis supplied)

During the hearings before the House and Senate Committees, similar views were expressed by witnesses who appeared before them. Senator Goldwater, a member of both the McClellan Committee and Subcommittee on Labor of the Senate Labor and Public Welfare Committee, stated in testimony before the Joint Subcommittee of the House Education and Labor Committee:

> "The Taft-Hartley Act prohibits certain types of payments by employers to labor unions or their agents as tending to corrupt or wrongfully influence them. Following this lead the bill *adds a prohibition on any loan as well.*" (Hearings before a Joint Subcommittee of the Committee on Education and Labor, House of Representatives, 86th Cong., 1st

Sess., on H. R. 3450, etc., Part 4, at 1627; emphasis supplied)

The President of the A. F. of L.-C. I. O., George Meany, expressed the same opinion to the House Committee:

> "Both these bills contain, in Section 107, provisions restricting loans from unions to their officers or employees, *and barring loans from employers to officers or employees of unions representing the particular employer's employees.* These provisions seem to us sound and desirable." (Hearings before a Joint Subcommittee of the Committee on Education and Labor, House of Representatives, 86th Cong., 1st Sess., on H. R. 3450, etc., at 103; emphasis supplied)

The reports on the amendatory legislation of both the House and Senate Labor Committees are in accord that a purpose of the amendatory legislation was to close the existing loopholes with respect to loans. The Senate Report states:

> "Although these provisions of existing law would punish most forms of bribery or extortion if they were vigorously enforced by prosecuting officers, the testimony before the McClellan committee revealed loopholes which both employer representatives and union officials turned to advantage at the expense of employees. The Committee bill proposes to close the loopholes * * *." (S. Rep. No. 187, 86th Cong., 1st Sess., p. 13.)

The use of the word "loopholes" in the plural refutes appellant's contention that only "middlemen" were being dealt with by the amendment and that this was the only "'loophole' intended to be closed." (Br., pp. 28, 30.)

Further, conclusive refutation is supplied by the entire legislative record. Certainly, the acknowledgment in appellant's Jurisdictional Statement (p. 10, reiterated in its Brief in Opposition to Motion to Affirm, p. 6), that "there is some material in the legislative history of the 1959 Act that points in the other direction," (i.e., that the amendment proscribed loans for the first time), is a gross understatement.

The House Report (No. 741, 86th Cong., 1st Sess.) contains at page 46 the following description of the proposed amendment:

> "Under existing law it is illegal for an employer to pay or deliver anything of value to a representative of his employees, except in those instances permitted by subsection (c) of section 302. The purpose of these amendments to section 302 is to forbid any payment, *loan*, or bribe by an employer, employer association, or anyone acting on an employer's behalf, i.e., labor relations consultant. The demand or acceptance of such payment, *loan*, or bribe is also proscribed." (Emphasis supplied)

Similar statements on the floor of both Houses during the course of debate on the legislation indicate that the amendment was understood by all of the members to proscribe employer loans for the first time. In addition to his statement on introducing the legislation, Senator Kennedy, just after the passage of the so-called Kennedy-Ervin Bill (S. 1555) by a 90 to 1 vote (105 Cong. Rec. 6745), stated:

> ". . . The basic provisions of the Kennedy-Ervin bill as it passed the Senate include the following . . .
> "Fifteenth. It prohibits loans by employers or unions to union officers" (105 Cong. Rec. 7021-2).

The proponent of the bill reported by the House Committee (H. R. 8342) was Representative Elliott, a member

of the House Committee on Education and Labor. In a speech on the floor delivered in his behalf, he stated of the amendment to Section 302 by Section 505 of the bill:

> "This section, 505, *adds* to the existing proscription of section 302(a) the prohibition that the *employer* or his labor relations expert or consultant not pay *or lend*, or agree to pay *or lend* anything of value 'to any labor organization or any officer or employee thereof' which represents, seeks to represent, or would admit to membership any of [sic] employees of such employer; . . ." (105 Cong. Rec. 15550; emphasis supplied).

Robert F. Kennedy, Chief Counsel to the McClellan Committee, one of the men most familiar with the requirements for new legislation and author of a book reviewing the results of the investigation, *The Enemy Within* (Harper Bros. 1959), placed before the House of Representatives his views on the need for new restrictions in a letter sent to each member and read to the House during debate by Representative Metcalf. The letter, in pertinent part, read as follows:

> "Dear Congressman:
>
> I received your inquiry in regard to my opinion of the various labor bills before the House of Representatives. I think it is appropriate, of course, that I limit my views to relating how the various bills match the findings and recommendations of the select committee.
>
> Based upon those investigations and findings, my conviction has been that any bill, to be effective, must include:
>
> • • • •
>
> 3. Safeguards against secret conflict of interest transactions by, or loans to, union officers. . . .

> In my opinion, the bill that passed the Senate would effectively write these provisions into law, as would the Elliott bill in a comparable form—thus carrying out all the recommendations of the McClellan committee. . . .
>
> Sincerely yours,
>
> ROBERT F. KENNEDY,
> *Chief Counsel"*

(105 Cong. Rec. 15687)

Senator Goldwater, who opposed the Senate Bill because he thought it was not strong enough (105 Cong. Rec. 6742, 6745), nevertheless agreed that the amendment to Section 302 did add a prohibition against employer loans. He said:

> "Section 302, as it presently reads, prohibits any such payment or delivery of money or other thing of value. This section adds a prohibition on any loan as well." (105 Cong. Rec. 10099)

Thus the principal proponents of the amendment (Senator Kennedy and Representative Elliott), the Chief Counsel to the McClellan Committee (Mr. Kennedy), a leading representative of labor (Mr. Meany), as well as the respective committees of each House, and Senator Goldwater, who voted against the Senate Bill, all concurred in the view that the amendment expanded the statute to prohibit loans by employers, either directly or indirectly, to labor organizations or officers or representatives thereof.

To this is added the fact that although 163 members of Congress were members both when the amendment to Section 302 was passed, in 1959, and when the original section was enacted in 1947, not one of them even intimated that Congress had intended in 1947 to make Section 302 applicable to loans (compiled from *Congressional Directory*, 86th Cong. 1st Sess., January, 1959).

In response to the overwhelming evidence of legislative intent to add a proscription of employer loans where none existed before, the appellant argues that the purpose of the amendment to Section 302 was solely to extend its application to "middlemen" (Br., pp. 28-36). However, the legislative history above reviewed amply demonstrates that Congress was also very much concerned with the problem of employer loans directly to labor representatives, and that the view of every one intimately connected with the legislation was that a proscription was being added against such activities.

Furthermore, subdivision (b) of Section 2 of the Labor-Management Reporting and Disclosure Act of 1959, which consists of a "Declaration of Findings, Purposes and Policy," speaks as to the need for additional legislation with respect to "labor organizations, *employers*, labor relation consultants and their officers and representatives" (emphasis supplied). This of itself clearly indicates that Congress was concerned with the activities of employers per se since they and "middlemen" (labor relations consultants) are mentioned separately.

The added word "lend" is no less novel than the added phrase "labor relations expert, adviser or consultant to an employer" ("middleman"), which the appellant concedes was a substantive addition (Br., pp. 27-32). Indeed, the latter phrase could more readily be construed as within the meaning of the term "employer" than can "lend" be construed as "pay or deliver." This is particularly true since the word "employer" has been held to include "any person acting as an agent of an employer, directly or indirectly" (*United States* v. *Lavery*, 161 F. Supp. 283, 286 (M. D. Pa.); *United States* v. *Ryan*, 128 F. Supp. 128, 131 (S. D. N. Y.).

Appellant's contention that Congress believed that loans were proscribed by the original language has no substantiation whatever, and is based solely upon a strained interpretation of language torn from its context. The excerpt quoted and emphasized by appellant (Br., p. 29) from the Senate Report on the Kennedy-Ervin Bill as amended, reads:

> "Section 302 already prohibits any payment by an employer to any representative of his employees" (S. Rep. No. 187, 86th Cong., 1st Sess., p. 11).

No one, of course, disputes that Section 302 as originally enacted proscribed "payments." However, for all of the reasons set forth in Point I hereinabove, the word "payment" cannot be construed as encompassing loans, and none of the language quoted by appellant contains any indication to the contrary.

Far more significant in this identical Report is the statement that "the testimony before the McClellan Committee revealed loopholes • • • The Committee bill proposes to close the loopholes" (*supra*, p. 23). Precisely applicable, therefore, is the recent decision of *Fischer Flouring Mills Co.* v. *United States*, 270 F. 2d 27 (C. A. 9), holding:

> "It is hornbook law that, where Congress has amended a statute to cover a 'loophole' the fact that an addition has been required is proof that the prior statute should be given a different construction." (270 F. 2d at 28)

The apparently universal view that the addition of the words "lend" and "loan" to Section 302 substantively changed the statute so as to add a proscription where none existed before has been succinctly expressed in Aaron, *The Labor Management Reporting and Disclosure Act of 1959*, 73 Harv. L. Rev. 851, 892 (1960):

> "It adds loans and agreements to lend to the types of payments already prohibited. It also adds the following to the list of recipients who may not receive such payments or loans. * * *".

Mr. Aaron further observes, at pages 892-93:

> "The amended law will outlaw bona fide loans, openly made, by some employers to their employees. This is unfortunate, but scarcely a weighty argument against commendable objectives of the amendment."

This Court has consistently held that where a statute, and particularly a criminal statute, is amended so as to include an additional specification of the crime, the amendment is in effect a legislative declaration that the new specification was not theretofore unlawful.

In *United States* v. *Chase*, 135 U. S. 255, the defendant had been indicted for mailing an indecent letter under a statute which proscribed the mailing of a "book, pamphlet, picture, paper, writing, print or other publication of an indecent character." After the indictment was filed, the statute was amended to add "letters" to the list of prohibited matter. The United States contended that the term "writing" included letters. The Supreme Court, in ruling that the statute had not been violated, stated:

> "If letters were embraced in the statute on which this indictment was founded, why did Congress consider it necessary to insert the specific word to designate them in 1888? It must be that body did not put the construction on the prior statute claimed in behalf of the United States, else we have it doing a useless and vain act" (p. 262).

Similarly, in *Viereck* v. *United States*, 318 U. S. 236, a statute requiring the disclosure of propagandists' activities

for foreign governments was amended after the acts for which defendant was indicted had occurred, so as expressly to proscribe the type of act for which Viereck was indicted. The Government argued (pp. 245, 247), precisely as it does here, that (1) the amendment was merely for the purpose of clarification, (2) to construe the original statute otherwise would have rendered it a "half-way measure," and (3) the Congressional Committee reports contained "no mention of the explicit restriction of the application of * * * the old Act" (in the instant case they do). Nevertheless, this Court, in reversing the Court of Appeals for the District of Columbia, held that the amendment extended the old statute and that the application, *ex post facto*, of the new was "not to be justified by denominating the amendment as clarifying or declaratory legislation" (p. 247).

See also: *United States* v. *Curtis*, 107 U. S. 671; *Sarlls* v. *United States*, 152 U. S. 570; *United States* v. *Weitzel*, 246 U. S. 533.

None of the decisions cited by the appellant (Br., p. 35) impairs, in the slightest degree, the effect of these authorities. They are either wholly inapplicable or materially distinguishable.

In *Rainwater* v. *United States*, 356 U. S. 590, the defendant had been sued under the civil provisions of the False Claims Act for making a false claim against the Commodity Credit Corporation, a wholly owned government corporation. The original False Claims Act proscribed the making of false claims "against the Government of the United States, or any department or officer thereof". Subsequently this provision was amended to include "any corporation in which the United States of America is a stockholder." The legislative history indicated that the amendment was intended to encompass certain corporations chartered under local law in which both

the government and private persons jointly held stock; *e.g.*, United States Shipping Board Emergency Fleet Corporation. Rainwater contended that the amendment showed that the original act did not apply to any government corporation. The Court rejected this contention pointing out that the Commodity Credit Corporation was a wholly owned instrumentality of the government and that in enacting the amendment Congress was concerned with a separate and distinct issue, *i.e.*, protecting corporations in which the stock was jointly owned by the government and private persons.

The *Rainwater* case might be similar to the instant case if Rainwater had been charged with the offense covered by the amendment—making false claims to a corporation the stock of which was only partially owned by the United States Government. That was the conduct Congress meant to expand the statute to prohibit. The expansion indicated no Congressional understanding that the statute as it previously existed did not apply to wholly-owned government instrumentalities. In the instant case, however, the legislative history shows that Congress understood the previous statute not to proscribe loans. Therefore Congress deemed it necessary to amend the statute to proscribe such acts.

Fogarty v. *United States*, 340 U. S. 8, also involved a civil action but no amendment of any statute was involved. *United States* v. *United Mine Workers*, 330 U. S. 258, was also a civil suit which did not involve an amendment. The post-adoptive Congressional views on prior legislation were expressed in debate on a wholly new statute not in *pari materia* with the old. *Commissioner* v. *Acker*, 361 U. S. 87, was a suit to collect a penalty tax. No amendment was involved and the rule of strict construction of penal statutes was applied to protect the taxpayer.

Thus, both the legislative history of the amendment to Section 302 and the effect given to such an amendment

by this Court lead to the same conclusion—that Section 302 before its amendment did not proscribe the acts charged in the indictment.

Conclusion.

For the foregoing reasons, the order of the District Court dismissing the indictment should be affirmed.

Respectfully submitted,

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